IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.383 OF 2003

Sukhdevsingh Shivrajsingh .. Applicant

versus

Tej Bahadursingh Nanhusingh .. Respondent

...

Mr. Navin Parekh with Ms. Hetal Patel for applicant.
Ms. Ameeta Kutti Krishnan with Mr. Maheen Pradhan for respondent.

CORAM : D.G. KARNIK, J

DATED :11th October, 2006

P.C.:

1. Heard learned counsel for the parties.

2. This revision application is directed against the judgement and order dated 4th and 5th October, 2002 passed by the appellate bench of the small causes court, Mumbai, allowing the appeal of the respondent tenant and thereby dismissing suit of the revision

applicant.

3. Revision applicant (for short ‘the applicant’) filed a suit against the respondent bearing R.A.E. & R. Suit No. 5313 of 1981 for possession on the sole ground of reasonable and bonafide requirement. The plaint was amended in January, 1989 and ground of default in payment of the rent was pleaded in paragraph 3(g). The plaint was again amended in August, 1998 and two more grounds were pleaded namely, acquisition of suitable residential premises by the defendant and non user of the suit premises for six months.

4. After consideration of the evidence adduced, the trial court held that applicant had not proved the case of reasonable and bonafide requirement. It also held that the respondent had not acquired suitable residential premises nor had he kept the suit premises locked and unused for six months immediately preceding the suit. However the trial court came to the conclusion that defendant/respondent was in arrears of rent and had failed to pay the rent inspite of repeated demands and therefore passed a decree for possession on the only ground of non payment of the rent.

5. Aggrieved respondent filed an appeal bearing Appeal No.31 of 2000 before the appellate bench of the small causes court, Mumbai. The appellate court came to the conclusion that the trial court erred in passing the decree on the ground that the respondent was in arrears of rent and had failed and neglected to pay the rent inspite of repeated demands. Appellate court also confirmed the findings on the other issues recorded by the trial court against the applicant. In this view of the matter the appellate court allowed the appeal and dismissed the suit of the applicant. That judgement is impugned in this revision application.

6. At the outset it must be remembered that the jurisdiction of this Court under Section 115 of the Code of Civil Procedure is limited. This Court can set aside the judgement in a revision application only on three grounds namely (i) the lower court has exercised the jurisdiction not vested in it, or (ii) the lower court has failed to exercise the jurisdiction vested in it or (iii) the lower court has acted in exercise of its jurisdiction illegally or with material irregularity. The first two grounds admittedly do not exist and therefore the scrutiny at the hands of this court would be limited to find out whether the

appellate court has exercised its jurisdiction, in setting aside the judgment and decision of the trial Court, illegally or with material irregularity.

7. The only ground pressed in this revision application for claiming a decree for possession is of default in payment of rent. Pleadings regarding default in payment of rent are found in paragraph 3(a) of the plaint which is reproduced below:-

> 3(a)"The plaintiff submits that the Defendant is not ready and willing to pay the monthly rent in respect of the suit premises and in this respect notice dt. 27.10.1980, 3.9.1983, 20.11.1986 and 29.7.1988 are already served upon the Defendant and inspite of the notices he failed and neglected to tender the monthly rent to the Plaintiff within the statutory period. The Defendant has also carried out extensive additions and alterations at the suit premises thereby constructing permanent structures at the suit premises without any permission from the Plaintiff. The Defendant has also changed the user of the suit premises by carrying out commercial activities at the suit premises without any permission or authority from the Plaintiff. The Defendant has also changed the user of the suit premises by carrying out commercial activities at the suit premises without any permission or authority from the Plaintiff."

8. It may be noted that applicant pleaded that he had served four notices on the respondent. The first notice dated 27th October,1980 was not a notice of demand of the rent but it was a notice terminating the

tenancy at the end of 27th October, 1980. This notice is therefore of no assistance to the applicant. Subsequent three notices dated 3rd September, 1983, 20th November, 1986 and 29th July, 1988 were all issued subsequent to the filing of the suit. As regards the second notice dated 3rd September, 1983 the appellate court has recorded a finding of the fact that the rent claimed in the notice was for less than six months. Furthermore it may be noted that the respondent did not take any action after this notice and did not even amend the plaint claiming the decree for possession on that ground. Similarly after the notice dated 20th November, 1986 the applicant did not take any action nor he amend the plaint but issued the third notice dated 29th July, 1988. By issuing fresh notice coupled with the fact that the applicant had not taken action in regard to earlier notices, it must be held that the applicant waived the earlier notice dated 20th November 1986. It may also be noted that by the notice dated 29th July, 1988 the applicant demanded arrears of rent amounting to Rs.449.40/- for the period from 1st November, 1986 to 31st July, 1988. Thus he admitted that he had received the rent upto 1st November, 1986 as demanded by the earlier notice dated 20th November, 1986. Having accepted the rent upto the end of

October, 1986 without any grievance and thereafter not taking any action for non payment of the rent and by further issuing fresh notice dated 29th July, 1988 the applicant must be deemed to have waived earlier notice dated 20th November, 1986.

9. The notice of demand dated 29th July, 1988 made demand of rent of Rs.449.40/- as arrears of rent at the rate of Rs.20.40/- per month from 1st November, 1986 to 31st July, 1988. The respondent-tenant replied the said notice by his reply dated 27th August, 1988 and sent cheque of full amount of Rs.449.40/-. The cheque was accepted by the applicant- landlord. Even after the amendment to the plaint the appellant has not claimed any arrears of rent; on the contrary he has claimed only future rent at the rate of Rs.21.40/- per month indicating thereby even on the date of amendment respondent was not in arrears of rent.

10. It may also be noted that the applicant had claimed the rent at the rate of Rs.21.40/- per month. According to the respondent the rent was not Rs.21.40/- per month but was only Rs.18.90/- per month and in addition the respondent was paying water charges at the rate of Rs.2.50/- per month. According to the

respondent the applicant did not pay the water bill and therefore he had paid the water charges directly to the municipal corporation. Therefore the demand of rent at the rate of Rs.21.40 p.m. made in the notice was not proper. He was bound to pay rent of Rs.18.90/- per month which he was always paying, which the applicant had refused to accept. It may be noted that in the light of these facts it was necessary for the applicant to plead in the plaint what the rent was and what demand he had made in the notices referred to in paragraph 3 a) of the plaint. The plaint is blissfully silent about it. The whole of the plaint does not mention anywhere what was the monthly rent. It also does not mention what was the arrears of rent on the dates of the notices referred in the plaint. It even does not mention what were the arrears of rent on the dates of said four notices. It is not mentioned in the plaint that the respondent was in arrears of rent for a period of more than six months which was the requirement under Section 12 of the Bombay Rent Act as existed on the date of filing of the suit.

11. It may also be noted that Section 12 of the Bombay Rent Act was amended in the year 1987 i.e. after the filing of the suit. Learned counsel for the

applicant however submits that the suit is covered by the amended subsection 3 Section 12 of the Bombay Rent Act which was amended by Maharashtra Act No.18 of 1987. Subsection 2 of Section 12 of the Bombay Rent Act provides that no suit for recovery of possession shall be instituted by the landlord against the tenant on the ground of non payment of the standard rent or permitted increases due until the expiration of one month next after notice in writing of the demand of the standard rent or permitted increases has been served on the tenant. The suit has been instituted in the year 1981, one month after the notice dated 27th October, 1980. However as stated earlier, notice dated 27th October, 1980 was not the notice of demand under Section-12(2) of the Bombay Rent Act. It was only a notice of termination of tenancy on the assumption that it was necessary to terminate the tenancy before institution of suit. Notices dated 3rd September, 1983, 20th November, 1986 and 29th July, 1988 are all subsequent to the institution of the suit. In view of the fact that the notices were subsequent to the suit and relying upon the decision of the Supreme Court in Rameshwar and others v/s. Jot Ram and others, reported in AIR 1976 Supreme Court 49, the appellate court has held that the suit on the ground of default in paying

rent was not maintainable.

12. Learned counsel for the applicant referred to and relied upon the decision of the Supreme Court in Sampath Kumar vs. Ayyakanu and another, reported in AIR 2002 Supreme Court 3369 and submitted that in para no.10 of the said decision the Supreme Court has laid down that it is competent to the Court while permitting amendment to direct that amendment would not relate back to the date of the suit. In the present case the court has not exercised that power which the Court had in view of the decision of Supreme Court in Sampat Kumar V/s. Ayyakanu (supra) In the circumstances this Judgement has no application. The view taken by the appellate court is a possible view and cannot be said to be exercising jurisdiction illegally or with material irregularity.

13. Counsel for the applicant also referred to and relied upon two decisions of Single Judges of this Court in Madhukar Digambar Joshi vs. Maruti Genu Sasane and others reported in 1986 Mah.R.C.J. 212, and Mohamed Yusufkhan Gulzarkhan vs. Mogalbeg Durbeg reported in 1994 Mh. L.J. 1724. Both these decisions are rendered interpreting Subsection 3 of Section 12 of

the Bombay Rent Act before the amendment. On the own submission of the learned counsel for the applicant that this case is governed by the amended Section 12 of the Bombay Rent Act these decisions are not helpful to the applicant.

14. Thus there is no merit in the revision application which is hereby dismissed with costs.

(D.G. KARNIK, J)